# 89- 1357

Supreme Court, U.S.
FILED
JAN 3 1990
JOSEPH F. SPANIOL, JR.
CLERK

PETITION NO. _____

**SUPREME COURT OF THE UNITED STATES**

OCTOBER 1989 TERM OF COURT

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THOMAS W. HILL, Petitioner - Plaintiff,

v.

PAUL S. BRITT, Respondent - Defendant,

DEPARTMENT OF THE AIR FORCE, Defendant.

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE*

*U.S. COURT OF APPEALS FOR THE TENTH CIRCUIT*

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**PETITION FOR WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether an interlocutory appeal may be taken out of time?

2. Whether a defendant, admittedly guilty of violating a plaintiff's fourth amendment rights in matters outside the scope of "personnel actions", is no longer subject to a qualified immunity test as stated in Harlow v. Fitzgerald, 457 U.S. 800 (1982), but is rather absolutely immune from suit whenever a prior federal employment relationship has existed?

## LIST OF PARTIES

In addition to the parties listed in the caption, Paul J. Vallerie and the Merit System Protection Board are parties in the District Court action.

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15 C. Wright, A. Miller, E. Cooper,
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## REFERENCE TO REPORTS

Order and Judgment, Appeal No. 88-2775, Tenth Circuit, reh'g denied. Appendix, pp. 34, 46.

Order (denying motion to dismiss appeal), Appeal No. 88-2775, Tenth Circuit, Appendix, p. 49.

U.S. District Court (D.N.M.) Findings of Fact, Dkt. No. 295, Civil No. 85-1485 JB. Appendix, p. 1.

U.S. District Court (D.N.M.) Memorandum Opinion and Order (Re: Constitutional Claims), Dkt. No. 477 , Civil No. 85-1485 JB. Appendix, p. 15.

## GROUNDS FOR JURISDICTION

The Order and Judgment for which review is sought is dated July 7, 1989. Plaintiff's Petition For Rehearing was denied by Order dated October 6, 1988.

Plaintiff believes that 28 U.S.C. Section 1254 confers upon the Supreme Court jurisdiction to review the Tenth Circuit Judgment in question.

## INVOLVED PROVISIONS

U.S. Constitution. This case involves provisions of the Fourth Amendment to the Constitution of the United States.

## STATEMENT OF THE CASE

This is a matter wherein the Petitioner's fourth amendment constitutional rights were admittedly and repeatedly violated by a former supervisor bent on reprisal for Petitioner's having blown the whistle on the supervisor's misconduct and having sued agency U.S. Air Force under provisions of the Privacy Act and the FOIA. The Court found Respondent's actions to be "something other than 'personnel actions' within the purview of any statutory scheme". Appendix, p. 26.

1. Amended complaint was filed 29 November 1985, stating inter alia a Bivens cause against Respondent. The D.N.M. District Court conducted a hearing in June 1986 and entered its findings of fact (Appendix p. 1), concluding that Petitioner was a victim of reprisal and

that his constitutional rights had been violated by Respondent and others. Evidence before the Court showed that Petitioner had been subjected to numerous invasions of privacy, including eavesdropping by a number of persons on his private conversations and spying on his out-of-duty actions. Bruno J. Manz, Petitioner's first level supervisor, affirmed spending about half of his time during the said period monitoring Petitioner's activities, including eavesdropping on Petitioner's personal discussions involving marital and other private matters. He further testified that he and others had done so in response to Respondent Britt's directives. Although Britt had absolutely no responsibility for such investigations, he admitted that he had directed the spy activities. The District Court further found that Peti-

tioner had been singled out for disparate treatment with a stated intent to "get" him. Appendix, pp. 4, 6.

2. By Initial Pre-Trial Order entered on 25 April 1986 (Dkt. No. 148) and signed by both parties, the District Court directed that all dismissal motions be filed no later than 30 September 1986,

> "Pre-trial motions, other than discovery motions, shall be filed on or before September 30, 1986; any pre-trial motions other than discovery motions, filed after the above date shall be considered untimely in the discretion of the Court ...
>
> APPROVED WITHOUT EXCEPTIONS
>
> [signature] Rhonda P. Backinoff
> For Defendant."

On that date Respondent filed an alternative motion to dismiss.

3. On 21 September 1987 the District Court denied the motion as to the constitutional claims against Respondent. Appendix, p. 15. In an exhaustive dis-

cussion the Court explained its reasoning and noted that Plaintiff's removal from federal service had been sustained by the Merit Systems Protection Board, but further noted that fourth amendment allegations had not, and could not be adjudicated by the Board, citing Bush v. Lucas, 462 U.S. 367 (1983) and Katz v. U.S., 389 U.S. 347 (1967).

4. During the ensuing seven month period Respondent took no further action regarding denial of his motion. Then, on 29 June 1988 (Dkt. No. 531), i.e., more than a year late, he submitted a supplement without leave of the Court, attempting to argue qualified immunity. The Court took no further action on the case until then pending appeals had run their course, and summarily denied the untimely motion on 14 October 1988.

5. Respondent noticed appeal on 9

November 1988. He based his appeal on the belated claim of qualified immunity, arguing that he had timely raised the said issue, and that the District Court had failed to rule on the matter. However, his 30 September 1986 motion to dismiss presents no showing of entitlement to qualified immunity. Neither did his Answer claim qualified immunity.

6. The Tenth Circuit granted review (Appendix, p. 49), denying Petitioner's motion to dismiss for lack of jurisdiction, which specifically noted untimeliness and cited the District Court Pre-Trial Report. In its Order the Appellate Court did not discuss these issues, but did state,

> "We note, however, that the record remains unclear regarding the parameters of this appeal. On September 21, 1987, the district court denied in part defendant's motion to dismiss without addressing the issue of defendant's qualified

> immunity. Defendant moved to supplement the motion to dismiss to further discuss the qualified immunity issue. Without elaboration, the district court denied the motion to supplement on October 14, 1988. On the state of the record, the appeal may not decide the qualified immunity issue ..."

7. The Court of Appeals subsequently refused to address the qualified immunity issue, instead granting all of the relief sought by Respondent on the basis of its holding that the nature of the constitutional tort is immaterial whenever a federal employment relationship has existed between the parties, and that such relationship forecloses a Bivens remedy. Appendix, p. 43. The Circuit Court implicitly revoked the holdings of its previous jurisdiction Order (para. 6 above), and further suspended the provisions of its own rules in order to afford separate relief sought by Respondent regarding recordation of a no-

tice of lis pendens. Appeal No. 88-2917. The action marked the third instance of interlocutory intervention by the Tenth Circuit in the instant proceeding in favor of the Defendants, and Defendants have since chided the District Court to get on with its rulings so that they may proceed with another appeal.

## REASONS FOR ALLOWANCE OF THE WRIT

### I. There Is Disagreement Among The Circuit Courts As To Whether An Interlocutory Appeal Of Qualified Immunity May Be Taken Out Of Time.

1. In a thorough review of this very issue within the context of qualified immunity the Fifth Circuit held, Kenyatta v. Moore, 744 F.2d 1179 (1984), cert. denied, 105 S.Ct. 2141 (1985),

"The [defendants'] first motion for summary judgment in December, 1978, asserted that they were absolutely immune from the plaintiff's state-law causes of action. The district court denied the motion in its order of December 21, 1979. They did not appeal that decision. ...

[Defendants] contend that they are now entitled to appeal the 1979 denial of their absolute immunity defense. They contend that interlocutory appeals are permissive and are not subject to the time limit set on appeals of right in Fed.R.App.P. 4. The conclusion is simply mistaken. 'The procedure for taking an appeal from an interlocutory order that is appealable as of right is precisely the same as that for taking an appeal from a final judgment. The appeal must be taken in the time provided by Rule 4 of the Federal Rules of Appellate Procedure. An interlocutory appeal need not be taken merely because it is authorized, but if it is authorized, it must be timely taken or the right to take it will be lost ...' 9 J. Moore, B. Ward, J. Lucas, Moore's Federal Practice Para. 110.21 2 (footnotes omitted).[29] ...

The fact that the defendants nominally reiterated their state-law absolute immunity

> defense in their second motion for summary judgment, which was never in fact ruled on by the court ... does not thereby give them a second opportunity to appeal. ... [Emphases added.]
>
> ---
>
> [29] ... See also 15 C. Wright, A. Miller, E. Cooper, Federal Practice and Procedure Section 3911 at 498."

2. The holdings of the Kenyatta case are directly applicable to circumstances herein. Respondent did not timely appeal the 21 September 1987 denial of his motion to dismiss, but rather waited until 29 June 1988 to "supplement" his previously denied motion. Under the circumstances he is stuck with Hobson's choice. If he did not timely raise the defense, he waived it under the local District Court Rules. See para. 3. below. Assuming arguendo that he did raise the same, his appeal was due sixty days after denial of his

motion to dismiss (with exceptions and extensions as provided in FRAP Rule 4, none of which apply herein).

3. According to the provisions of the Rules of the U.S. District Court for the District of New Mexico, Respondent has waived qualified immunity defense. At Rule 5.c., Id.,

> "If an answer or other pleading raises or contains any of the seven enumerated defenses provided in Rule 12(b) of the Federal Rules of Civil Procedure, the party filing such pleading shall request in writing that such portion of the answer or other pleading be treated as a motion filed under Rule 9 of these rules. Should a party fail to make such written request, such a defense may be treated as having been waived, except for jurisdictional motions."

At Rule 9.c., Id.,

> "Opposed Motions. Counsel shall submit with all opposed motions a brief or supporting points with citations or authorities. Where allegations of fact are relied upon, affidavits in support shall be attached."

In his Answer (Dkt. No. 38) Respondent did not claim qualified immunity, but did recognize the importance of the Rule 5 requirements and promised to file some non-specific pleading to satisfy them at a later date. He never did so.

4. By motion to dismiss Petitioner pointed out these facts to the Tenth Circuit; however, the Circuit Court denied his motion without mentioning the timeliness issue. The Circuit Court has effectively held that the District Court can not enforce its own deadlines and other rules, and that provisions of Rule 4 of the Federal Rules of Appellate Procedure do not apply whenever a defendant belatedly moves to dismiss under a claim of qualified immunity. The failure to timely appeal is "mandatory and jurisdictional", United States v. Robinson, 361 U.S. 220, 224 (1960), and the Tenth Circuit's

willingness to waive the requirement for the Department of Justice opposes Congressional intent to strictly limit Appellate Court interference during the trial court proceeding. In fact, Circuit Court interventions in the instant action have made shambles of the District Court proceeding. Not only has the Tenth Circuit granted every detail of relief sought by the Defendants, including Defendants' request that it suspend provisions of its own rules to afford summary relief (Appeal No. 88-2917), but it also directed the Respondent to pressure the District Court for reconsideration after appeal had been taken. Tenth Circuit Order, Appendix, p. 51,

> "[D]efendant is directed to seek clarification of the status of the qualified immunity issue in the district court ... perhaps the district court will expedite its consideration and disposition of the issue."

## II. The 10th Circuit Has Misinterpreted Bivens and Schweiker v. Chilicky In The Decision Under Review. Its Holding Is At Variance With Bivens And Overrules The Test Fashioned By The Supreme Court In Harlow v. Fitzgerald.

1. In Harlow v. Fitzgerald, 457 U.S. 800 (1982), the Supreme Court provided a qualified or "good faith" immunity test for officials of the Executive Branch other than the President and his advisors. In order to claim such defense an official must demonstrate that he did not knowingly violate the law or that a reasonable person would not have known that the actions of which he is accused were so violative. The Respondent herein cannot maintain either claim. The District Court found that he had boasted of his intent to harm the Peti-

tioner and that he had coordinated his actions with agency attorneys. Further, the dates of Katz v. United States, 389 S.Ct. 347 (1967), United States v. United States District Court, 407 U.S. 297 (1972) (Keith), and Mitchell v. Forsyth, 472 U.S. 511 (1985) preclude claims of unawareness by a reasonable person.

2. Schweiker v. Chilicky, 108 S.Ct. 2460 (1988), does not support the proposition that the Supreme Court has abandoned the standard of qualified immunity for federal officials accused of constitutional deprivations external to the scope of their official duties. The gravamen of the Chilicky case was action which was within the scope of Schweiker's official duties. Moreover, the two personnel cases summarily returned to the Appellate Courts for reconsideration following the Chilicky decision both

involved clearly-defined personnel actions, which were within the scope of the official duties of the defendants. By contrast, the District Court has found the instant Respondent's actions to be "something other than personnel actions", and the Tenth Circuit has admitted that "Hill's allegation of violation of his right to privacy by Britt's eavesdropping on his personal telephone conversations is not an allegation of a violation of a listed prohibited personnel practice". The Tenth Circuit's determination that Petitioner may not pursue a Bivens cause against Respondent is directly contravened by Bush v. Lucas, 462 U.S. 367, 385 n.28 (1983),

> "[C]ertain actions by supervisors against federal employees, such as wiretapping, warrantless searches, or uncompensated takings, would not be defined as 'personnel actions' within the statutory scheme."

At 391, Id., Marshall, J., concurring,

> "Moreover, there is nothing in today's decision to foreclose a federal employee from pursuing a Bivens remedy where his injury is not attributable to personnel actions which may be remedied under the federal statutory scheme."

3. Application of O'Connor v. Ortega, 107 S.Ct. 1492 (1987) to the circumstances herein is dispositive to all issues. O'Connor, the executive director of Napa State Hospital, was a supervisor of plaintiff Ortega, a physician who accused O'Connor of violating his constitutional rights of privacy. The Court did not release O'Connor under a claim of immunity accruing from an employment relationship, but instead held (Id., 1504),

> "[P]ublic employer intrusions on the constitutionally protected privacy interests of government employees for noninvestigatory, work-related purposes, as well as for investigations of work-related misconduct, should be judged by a standard of reasonableness under all circumstanc-

> es. Under this reasonableness standard, both the inception and the scope of the intrusion must be reasonable. ... On remand, therefore, the District Court must determine the justification for the search and seizure, and evaluate the reasonableness of both the inception of the search and its scope."

There is no distinction between Section 1983 actions against state officials, as in O'Connor, and Bivens actions against federal officials. Butz v. Economou, 438 U.S. 478, 98 S.Ct. 2894, 2909, (1978),

> "[W]e deem it untenable to draw a distinction for the purposes of immunity law between suits brought against state officials under Section 1983 and suits brought directly under the Constitution against federal officials."

## CONCLUSION

Petitioner believes that the instant Tenth Circuit Judgment should be summarily reversed for lack of Appellate

Court jurisdiction of the subject matter, permitting District Court trial to proceed. In the alternative, Petitioner seeks reversal on the merit. If the Supreme Court is of the opinion that oral argument should be provided only by a practicing attorney, Petitioner shall comply with such indication.

Respectfully submitted,

Thomas W. Hill
Petitioner

Supreme Court, U.S.
FILED
JAN 3 1990
JOSEPH F. SPANIOL, JR.
CLERK

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**SUPREME COURT OF THE UNITED STATES**

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THOMAS W. HILL, Petitioner - Plaintiff,

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PAUL S. BRITT, Respondent - Defendant,

DEPARTMENT OF THE AIR FORCE, Defendant.

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE*

*U.S. COURT OF APPEALS FOR THE TENTH CIRCUIT*

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**APPENDIX: PETITION FOR WRIT OF CERTIORARI**

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

FILED
At Albuquerque
Sep 18 1986
Jesse Casaus
Clerk

THOMAS W. HILL,

Plaintiff,

v.

Civil No.
85-1485-JB

DEPARTMENT OF AIR FORCE,
PAUL S. BRITT, and
PAUL J. VALLERIE,

Defendants.

COURT'S FINDINGS OF FACT
AND CONCLUSIONS OF LAW

THIS MATTER having come on for a hearing on June 13 and 16, 1986, and the Court having adduced evidence, makes the following findings of fact and conclusions of law.

Findings of Fact

1. This matter comes before the Court on Plaintiff's motion for injunc-

tion wherein he seeks reinstatement of his security clearance which was revoked on or about May 24, 1985; that on that date Plaintiff had a TOP SECRET clearance with access to Sensitive Compartmentalized Information.

2. Prior to Plaintiff's removal from Federal service on July 5, 1985, Plaintiff was a Federal civil servant employed by Defendant at the GS-13 and GS-14 grade levels and assigned, from July 1973 to July 1985, to the Directorate of Aerospace Studies at Kirtland Air Force Base, New Mexico, (AFCMD/SA).

3. During almost twenty years of his employment, Plaintiff was cleared for access to classified materials, the most recent level being TOP SECRET Sensitive Compartmentalized Information.

4. At the time of the revocation of his security clearance, Plaintiff was under the direct supervision of Colonel

Paul Britt, the Director of AFCMD/SA.

5. The tensions between Plaintiff and Colonel Britt resulted from accusations of Colonel Britt that Plaintiff had made personal telephone calls at government expense on the Directorate's AUTOVON telephone system; that Plaintiff responded to the allegations by accusing Colonel Britt of abusing TDY funds to pursue personal interests that, thereafter, Colonel Britt brought formal charges against Plaintiff for the unauthorized calls and, further, accused Plaintiff of theft for Plaintiff's removal of personal notes abandoned by a previous Directorate employee.

6. Major John Gowan, the Deputy Director of AFCMD/SA, upon being assigned to the unit, heard rumors and references regarding Plaintiff which he deemed to be unprofessional: that the Technical Director of AFCMD/SA referred

to Dr. Hill as "Dr. Moriarty"; that Plaintiff had been singled out for adverse and disparate treatment.

7. Major John Gowan gave special attention to Plaintiff because of the way management responded to Plaintiff; that he attempted to intercede between Plaintiff and Colonel Britt in order to resolve the problems in the Directorate; that Plaintiff at all times acted professionally and made reasonable professional attempts to reconcile all differences; that Colonel Britt was unresponsive and negative in manner; that Colonel Britt was not objective and made numerous statements reflecting a vindictive attitude; that Colonel Britt used any opportunity to place Plaintiff in an unfavorable light.

8. James H. Suttle, previously a 14-year civil servant, grade GS-14, with Aerospace Studies had known Colonel Britt

since 1965 and had known Plaintiff since 1972-73; that he considered Colonel Britt a friend as well as a boss.

9. Mr. Suttle played the role of a mediator in order to diffuse tensions between Colonel Britt and Plaintiff but with no success; that he characterized Colonel Britt's management technique as that of a "threat type"; that this management style always had a "whipping boy"; and that Plaintiff was the brunt of Colonel Britt's technique.

10. Mr. Suttle testified that security clearances were used in a way to influence behavior during Colonel Britt's tenure and that of his predecessor; that disparate treatment was common regarding sanctions imposed for security violations

11. In acting as a mediator, Mr. Suttle informed Colonel Britt that Plaintiff would drop certain grievances which he had in an effort to mediate differ-

ences so that he could go on with his assigned duties; that this offer was refused; that Colonel Britt considered Plaintiff's grievances as a threat to Britt's authority and that Colonel Britt set out to "get him [Plaintiff]"; that Colonel Britt carried out a vendetta; and that Colonel Britt became obsessed with the "Hill problem."

12. As Major Gowan sought to act as an arbiter between Colonel Britt and Plaintiff, Colonel Britt became more alienated and informed Major Gowan that his actions in support of Hill were inappropriate; that, thereupon, Major Gowan requested to be transferred and he was subsequently transferred to the Emergency Directorate of CMD; that thereafter Colonel Britt sought means to have Major Gowan court - martialed for his having sided with Plaintiff.

13. Prior to his disaffection with

Major Gowan because of his support of Plaintiff, Colonel Britt rated Major Gowan in the highest category possible in his officer effectiveness report of June 1985.

14. According to Major Gowan, Colonel Britt wanted Plaintiff out of the Air Force and "erased from memory"; that he referred to Plaintiff as a "non-person" and stated that he would do anything to "get Plaintiff"; that the removal of Plaintiff's security clearance was a means to "eradicate" Plaintiff.

15. In retaliation for Plaintiff's charges Colonel Britt revoked Plaintiff's security clearance on May 24, 1985, asserting that the revocation was in the interest of national security and alleging that Plaintiff had acted dishonestly; established a pattern of poor judgment and unreliable behavior and was untrustworthy; that, further, Colonel Britt es-

tablished a special security file on Plaintiff; that Plaintiff was not given any opportunity to answer the allegations or otherwise contest the revocation.

16. Colonel Britt's actions were also motivated by Plaintiff's having filed suit against the agency in June 1984 and of his having filed grievances in the past.

17. On June 10, 1985, as a consequence of Colonel Britt's actions, the Air Force Security Clearance Office (AFSCO) placed a "pending adjudication" code by Plaintiff's name in its computer file and made that data available to all Department of Defense users; that the coded entry has prevented Plaintiff's access to classified materials until such time as the special security file on Plaintiff has been adjudicated; that as a consequence of Plaintiff's termination from Federal service, the AFSCO has refused to

adjudicate the file.

18. On July 31, 1985, AFSCO entered a "Z code" by Plaintiff's name in the AFSCO computer file; that the "Z code" indicates that Plaintiff has left the employ of the agency and that the agency possesses derogatory data regarding Plaintiff's suitability for a security clearance; that the "Z code" has damaged Plaintiff and precluded his employment in the defense community although Plaintiff's capabilities are in demand.

19. In a conversation with Mr. Suttle in Washington, D.C., Colonel Britt knew that Plaintiff was seeking other employment and acknowledged that the revocation of Plaintiff's security clearance would prevent Plaintiff from obtaining employment.

20. Mr. Suttle testified in favor of Plaintiff before the Merit Board, and as a consequence the Air Force retaliated

against Suttle.

21. John Gowan, the Deputy Director of AFCMD/SA, and Mr. James H. Suttle, testified unequivocally that Plaintiff was not a security risk.

22. In reviewing Colonel Britt's actions in revoking Plaintiff's security clearance and questioning his eligibility, General Bernard L. Weiss, Commander of the Air Force Contract Management Division, made the following findings:

a. That the acts attributed to Plaintiff did not have adverse security significance.

b. That the facts of Plaintiff's case did not indicate that Plaintiff was a threat to national security.

c. That Plaintiff's security record during 20 years of service was unblemished and the withdrawal of Plaintiff's security clearance was unwarranted.

23. John W. Dettmer, Director of

Strategic Defense Force, and prior director of the Technical Office in the Weapons Laboratory, testified of Plaintiff's excellent reputation and that Plaintiff was not a security risk.

24. In his performance evaluation by Lt. Colonel Paul J. Vallerie, Director of Aerospace Studies for the years 1982 and 1983, Plaintiff was rated as excelling in safeguarding classified information and following established security procedures.

25. According to the Department of Defense Personnel Security program, revocation of a security clearance for access to classified information is deemed to be an adverse action. Defendants' Exhibit F, p. 59, para. 8-100(a).

26. Pursuant to the Personnel Security program; Defendants are required to adjudicate all special security files regardless of any other adverse action

taken including separation. Defendants' Exhibit F, p. 60, para. 102(e)(2).

27. The actions of Colonel Britt with the assistance of Captain David W. Hickman, the Staff Judge Advocate, as reflected in the evidence, lead the Court to conclude that the revocation of Plaintiff's security clearance was not because of any adverse security significance but, rather, motivated solely by a deliberate intention to prevent Plaintiff from obtaining employment with civilian agencies who deal in the defense industry where security clearances are essential.

28. The Department of Air Force has failed to establish a rational nexus between the adverse action taken and the articulated reasons for the action.

29. Plaintiff's work opportunities have been severely limited by a fact determination which failed to comport with the traditional ideas of fair procedure;

and that Defendants have failed to observe even the most minimal due process procedures in revoking Plaintiff's security clearance.

Conclusions of Law

1. The Court has jurisdiction of the subject matter of, and the parties to, this action.

2. Plaintiff will be irreparably harmed if a preliminary injunction is not granted.

3. Plaintiff has made a prima facie case showing a reasonable probability that he will ultimately prevail on the merits.

4. The threatened injury to Plaintiff outweighs whatever damage the proposed preliminary injunction may cause Defendants.

5. The preliminary injunction, if issued, will not be adverse to the public

interest.

6. A preliminary injunction should be issued enjoining the Department of Air Force to reinstate Plaintiff's security clearance to the level held prior to May 24, 1985; and, further, that the Department of Air Force should be enjoined to remove the "Z code" by Plaintiff's name in the AFSCO computer file and that the computer records should be programed to indicate that Plaintiff is entitled to access to classified material consistent with the security clearance held prior to May 24, 1985; that the Department of Air Force notify all inquiring agencies of the reinstatement of Plaintiff's security clearance without derogatory information.

[Signed by Juan G. Burciaga]
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

FILED
At Albuquerque
Sep 21 1987
Jesse Casaus
Clerk
Entered On Docket
09-21-87

THOMAS W. HILL,

Plaintiff,

v.

Civil No.
85-1485-JB

DEPARTMENT OF AIR FORCE,
PAUL S. BRITT, and
PAUL J. VALLERIE,

Defendants.

MEMORANDUM OPINION AND ORDER

THIS MATTER comes before the Court on Defendants' motions to dismiss, or in the alternative, for summary judgment on Counts I and V of Plaintiff's Second Amended Complaint. The Court, having reviewed the pleadings, the evidence of record and the relevant law, and treating these as motions for summary judgment, finds that Defendants' motions should be granted in part and denied in part. To

the extent that Plaintiff seeks to state a claim under the Federal Tort Claims Act, that claim will be denied. Plaintiff's motion to amend his Complaint to add David Hickman as Defendant will also be denied.

Defendants Paul J. Vallerie and Paul S. Britt seek dismissal or summary judgment of the claims alleged against them in Counts I and V respectively of Plaintiff's Second Amended Complaint. Both of these Defendants are Air Force employees who served as directors of Aerospace Studies and were Plaintiff's second level supervisors during the time he was employed at Kirtland Air Force Base in Albuquerque, New Mexico.

Claims against Defendant Vallerie

Plaintiff seeks damages against Defendant Vallerie in his individual capacity for violations of Plaintiff's due process rights based on Defendant Val-

lerie's "actions in maintaining ... illegal records on Plaintiff's performance and conduct and his use of them to deny Plaintiff deserved employment benefits and promotion opportunities ..." Second Amended Complaint, First Cause of Action, Para. 1. These records, maintained without Plaintiff's knowledge, are described as "copies of letters sent to Plaintiff's first level supervisor, directing him to take punitive actions against the Plaintiff, and also included copies of letters sent to other agency officials." Id., Facts Relevant To Causes Of Action, Para.2. They were disclosed to Defendant Britt, Vallerie's successor in office. 1/

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1/ These same records were later the subject of a request of access by Plaintiff under the Freedom of Information and Privacy Acts. The request was denied at the agency level, because they were characterized as Vallerie's "personal notes." This finding was affirmed by the U.S. District Court for the District of Columbia (Civ. No. 84-1952, June 26, 1985), and then by the U.S. Court of Appeals for the D.C. Circuit (No. 85-5805).

In many situations, damage suits will lie against federal officials for violation of one's constitutional rights pursuant to the teachings of Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971). A judicially created damage remedy for violation of constitutional rights by federal officials in not universally available, however. In Bush v. Lucas, 462 U.S. 367 (1983), the Court held that petitioner, who claimed he had been demoted from his civil service position in retaliation for his having exercised his first amendment rights had no Bivens-type cause of action for damages. As petitioner's claims arose out of an employment relationship with the United States governed by "comprehensive procedural and substantive provisions giving meaningful remedies," the Court found the statutory scheme to be "a special factor counseling

hesitation" and declined to fashion a separate nonstatutory damages remedy. See id. at 378. The statutory remedies need not be fully comprehensive or even as effective as an individual damages remedy. ... In deferring to the congressional scheme in such an instance, the Court limited its holding to claims of unconstitutional conduct involving personnel actions covered by this system. Id. at 385 n. 28; see also the concurring opinion of Marshall, J., id. at 390-91.

As to Plaintiff's due process claims against Defendant Vallerie, the evidence shows that administrative grievance procedures were in effect for resolving disputes over records maintenance not otherwise under the jurisdiction of the Privacy Act, 5 U.S.C. Section 552a and that Plaintiff periodically availed himself of these procedures. See Declaration of Pat H. Chrisman, Para. 3. The

Court thus concludes that Plaintiff's due process claims based upon Vallerie's maintenance and use of these "illegal" records are adequately addresses by a comprehensive statutory scheme that would preclude a Bivens-type damage remedy. See also Philippus v. Griffin, 759 F.2d 806 (10th Cir. 1985); Vest v. United States Department of the Interior, 729 F.2d 1284 (10th Cir. 1984); Dynes v. Army Air Force Exchange Service, 720 F.2d 1495 (11th Cir. 1983). Therefore, Plaintiff's [first] cause of action against Defendant Vallerie in his individual capacity will be dismissed.

Claims against Defendant Britt

As stated in Plaintiff's fifth cause of action Defendant Britt, "in taking the actions which have resulted in the suspension of Plaintiff's security clearance" "willfully disseminated alle-

gations which he knows to be false and injurious to Plaintiff's reputation, and have been designed to obstruct Plaintiff's employment opportunities." Plaintiff specifically alleges that Britt took action to remove Plaintiff's name from the list of eligibles for a position at the USAF Space Division. Defendant Britt "also personally acted to cause illegal takings of Plaintiff's personal conversations and has wantonly disseminated information to which Plaintiff has rights of privacy." Second Amended Complaint Fifth Cause of Action, Paras. 1, 5. Such actions are said to have resulted in denial of due process to Plaintiff for which Plaintiff seeks damages against Defendant Britt in his individual capacity.

Plaintiff acknowledges in his complaint that the employment obstruction actions alleged "directly violate the provisions of 5 U.S.C. Section 2302(b)

(4)." Complaint, Fifth Cause of Action, Para. 3. This section describes prohibited personnel practices applicable to "any [federal] employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority -- (4) deceive or willfully obstruct any person with respect to such person's right to compete for employment." As a "prohibited personnel practice," a person having such a grievance may direct it to the Office of Special Counsel ["OSC"], pursuant to 5 U.S.C. Section 1026. The OSC has the authority to investigate the allegations and may, in his discretion, petition the Merit Systems Protection Board ["MSPB"] for "corrective action" against agencies or employees engaged in the prohibited practice. A decision to settle or not to pursue a claim is basically unreviewable. In this instance,

Plaintiff sought to pursue his claims with the OSC who declined to bring Plaintiff's claims to the attention of the MSPB.

Defendant argues that under the teachings of Bush v. Lucas, supra, Plaintiff is limited to his statutorily created remedies and that the existence of such a scheme is a special factor counseling hesitation in recognizing a separate constitutional cause of action. This Court disagrees.

Assuming for the moment that Plaintiff's allegations that Defendant Britt disseminated false information resulting in injury to Plaintiff's reputation and obstructed his employment opportunities can be substantiated, such allegations would implicate a liberty interest deserving of due process protections. See Board of Regents v. Roth, 408 U.S. 564, 573 (1972); Kelleher v. Flawn, 761 F.2d

1079 (5th Cir. 1985); Munson v. Friske, 754 F.2d 683, 693 (7th Cir. 1985).[2/]

The courts have reached differing conclusions on the issue of whether the Plaintiff's recourse to the OSC provides an adequate remedy under Bush v. Lucas. However, in an exhaustive consideration of the issue, the United States Court of Appeals for the District of Columbia Circuit ruled that where the alternative remedy is not judicially reviewable, it is not adequate under Bush and would not preclude a constitutionally based cause of action. See Spagnola v. Mathis, 809 F.2d 16 (D.C. Cir. 1986); see also Kotarski v. Cooper, 799 F.2d 1342, 1348-49 (9th Cir. 1986); Egger v. Phillips, 710 F.2d 292, 298 (7th Cir.), cert. denied, 464 U.S. 918 (1983); Pope v. Bond, 613 F.

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2/ Whether or not the procedures supplied to Plaintiff in this case satisfied the requirements of due process is not now before the Court.

Supp. 708, 715 (D.D.C. 1985); Niertert v. Kelley, 582 F.Supp. 1536, 1537 (D. Colo. 1984). But see Pinar v. Dole, 741 F.2d 899 (4th Cir. 1984), cert. denied, 471 U.S. 1016 (1985); Hallock v. Moses, 731 F.2d 754, 757 (11th Cir. 1984); Watson v. United States Department of Housing & Urban Development, 576 F.Supp. 580, 586 (N.D.Ill. 1983); Cazalas v. United States Department of Justice, 569 F.Supp. 213, 229 (E.D.La. 1983), aff'd, 731 F.2d 280 (5th Cir. 1984, cert. denied, 469 U.S. 1207 (1985).

While the Supreme Court in Bush gave little guidance regarding precisely what is required to make a remedy adequate, it is noteworthy that the Plaintiff in Bush had a right to judicial review of his claims. This Court sides with the Spagnola court in questioning whether judicial review can be totally precluded when constitutional rights are

at stake. 809 F.2d at 28. See also Califano v. Sanders, 430 U.S. 99, 109 (1977) ("Constitutional questions obviously are unsuited to resolution in administrative hearing procedures and, therefore, access to the courts is essential to the decision of such questions"). Thus, this Court declines to dismiss Plaintiff's due process claim against Defendant Britt in his individual capacity involving obstruction of Plaintiff's employment opportunities.

As to the other matter alleged by Plaintiff against Defendant Britt, in which he claims Britt's use of illegal surveillance against him, Plaintiff properly suggests that Britt's actions were something other than "personnel actions" within the purview of any statutory scheme. In his brief he accuses Defendant Britt of "Gestapo-type tactics involving illegal surveillance and unwar-

ranted takings." Combined Response to Defendants' Motions to Dismiss, or to Grant Summary Judgment Regarding Counts I and V, p.6. The evidence presented by Plaintiff suggests that Col. Britt was involved in monitoring of Plaintiff's telephone conversations at his place of employment and in recruiting others to do the same.

To the extent that such actions interfere with Plaintiff's legitimate expectation of privacy, Plaintiff has pled an independent constitutional violation that would not be redressable under the civil service statutory scheme and therefore not barred by the Bush v. Lucas rationale. "[C]ertain actions by supervisors against federal employees such as wiretapping, warrantless searches or uncompensated takings, would not be defined as 'personnel actions' within the statutory scheme." See Bush, 462 U.S. at

385 n. 28; see also id. at 391 (Marshall, J., concurring).

Such an injury is not redressable by the statutory scheme as it is not a "personnel action" under 5 U.S.C. Section 7502 or 5 U.S.C. Section 2302. The only forum available for redress of such an injury would be the district court. While the Defendant points out that the testimony regarding these matters was adduced at the proceedings of the Merit Systems Protection Board, no determination was made as to whether the alleged surveillance activities were contrary to law. Since these were not strictly "personnel actions," the administrative scheme did not provide a direct remedy. Even if the removal action was upheld on legitimate grounds, Plaintiff may still seek redress for this type of independent constitutional violation.

The Court thus finds that genuine

issues of material fact exist as to whether Defendant Britt's actions infringed on Plaintiff's legitimate expectation of privacy. See Katz v. United States, 389 U.S. 347 (1967). There remain questions of fact on these issues that preclude summary judgment on this aspect of Plaintiff's claims against Defendant Britt.

Common Law claims

To the extent that Plaintiff's Complaint attempts to state a common law cause of action against these Defendants, such as one for defamation, the Court would agree with the Defendants that such an action would be barred by the Barr v. Mateo doctrine. In Barr, 360 U.S. 564 (1959), the Supreme Court held that federal officials are entitled to absolute immunity for common law torts where the defendants' actions constituted an appropriate exercise of discretion "within the outer perimeter of their duties." Id. at

575. This standard has been liberally applied so as to allow federal officials the freedom to perform their duties unfettered by the threat of lawsuits which might diminish the effectiveness of governmental administration. Id. at 571.

Based on the evidence submitted, the Court finds that in reporting, investigating and proposing actions concerning Plaintiff's access to classified information and his removal from federal service, both Defendants were acting within the scope of their responsibility as Plaintiff's supervisors. See Williams v. Collins, 728 F.2d 721, 727 (5th Cir. 1984). As such, Defendants' actions were highly discretionary acts that would further the policies underlying the official immunity doctrine. See Strothman v. Gefreh, 739 F.2d 515, 518 (10th Cir. 1984). Even an allegation of malice will not defeat immunity where the action itself

was within the scope of Defendants' employment. Barr, 360 U.S. at 575.

Federal Tort Claims Act claims

Next, the Court considers whether Plaintiff has stated a claim against Defendants Vallerie and Britt under the Federal Tort Claims Act ["FTCA"], 28 U.S.C. Section 1346. Plaintiff filed with this Court a "Notice of Intent Regarding Federal Tort Claims Cause" asking the Court to construe his Second Amended Complaint as encompassing such a claim. Defendants move to dismiss any such claim on several grounds. First, Plaintiff has failed to name the United States as a defendant. The United States is the only proper defendant under such a claim. 28 U.S.C. Section 2674. Nor is the correspondence submitted by Plaintiff adequate to fulfill the requirement that Plaintiff file an administrative claim to the federal agency, clearly stating the total

damages claimed. See 28 U.S.C. Section 2675. This requirement is jurisdictional and may not be waived. Three-M Enterprises, Inc. v. United States, 548 F.2d 293 (10th Cir. 1977). Furthermore, the only common law tort to which Plaintiff makes reference in his "Objection to Defendants' Motion to Dismiss Any Claim Under the FTCA" is slander, for which the FTCA does not waive immunity. 28 U.S.C. Section 2680(h). Furthermore, Plaintiff's due process claims may not be the subject of an FTCA action. For all these reasons, the Court declines to find that Plaintiff has stated any claim under the FTCA and will grant Defendants' Motion to Dismiss.

Motion To Amend Complaint

Plaintiff has recently moved to amend his Second Amended Complaint to add David Hickman as a defendant. The Court finds this motion to be untimely, as the

case is now preparing for trial. Accordingly the motion to amend will be denied.

Wherefore,

**IT IS ORDERED, ADJUDGED AND DECREED** that Defendants' motions to dismiss, or in the alternative, for summary judgment on COUNTS I and V and of Plaintiff's Second Amended Complaint be, and the same hereby are:

1. granted as to Defendant Vallerie in his individual capacity; and

2. denied as to Defendant Britt on the constitutional claims, but granted as to the common law and Federal Tort Claims Act claims.

**IT IS FURTHER ORDERED** that Plaintiff's motion to amend complaint to add David Hickman as a defendant be, and the same hereby is, denied.

DATED this 18th day of September, 1987.

[Signed by Juan G. Burciaga]
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

FILED
U.S. Court of Appeals
Tenth Circuit
JUL 07 1989
ROBERT L. HOECKER
Clerk

| | |
|---|---|
| THOMAS W. HILL, Plaintiff-Appellee, | |
| v. | No. 88-2775 (D.C.No. 85-1485-JB) |
| DEPT. OF AIR FORCE; PAUL J. VALLERIE, Defendants, and PAUL. S. BRITT; Defendant-Appellant. | (D. N.M.) |

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* ORDER AND JUDGMENT

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Before McKAY and ANDERSON, Circuit Judges, and BROWN, DIstrict Judge.**

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** The Honorable Wesley E. Brown, District Judge, United states District Court for the District of Kansas, sitting by designation.

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* [Appellant's Motion to publish granted]

After examining the briefs and appellate record, this Panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed.R.App.P. 34(a); 10th Cir.R. 34.1.9. The cause is therefore ordered submitted without oral argument.

Defendant Paul S. Britt appeals from two district court orders setting this case for trial and apparently rejecting his claim of qualified immunity. Britt argues that the district court erred in not dismissing this Bivens action, Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971), (1) because Britt is entitled to qualified immunity and (2) because no Bivens remedy may be implied to supplement Civil Service Reform Act remedies in federal personnel matters. We agree with Britt's second argument and reverse.

Plaintiff Thomas W. Hill, a civilian military employee at Kirtland Air Force Base in New Mexico working in star wars research, commenced this action against his former supervisor, Britt. In the fifth cause of action in his second amended complaint, Hill alleged Britt violated his constitutional right to due process by interfering with his security clearance and future Air Force job possibilities by collecting and disseminating to superiors and other agency officials false information about Hill. Hill also alleged that Britt violated his rights to due process and privacy by eavesdropping on his telephone conversations either personally or by ordering others to do so. Britt filed a motion to dismiss alleging absolute and qualified immunity. The district court dismissed part of the fifth cause of action on ab-

solute immunity grounds. It did not discuss qualified immunity. Britt subsequently moved to supplement his motion to dismiss again raising the qualified immunity issue. Without explanation, the district court denied the motion to supplement. Britt appealed.

It is well settled that a court of appeals has jurisdiction to consider an interlocutory appeal involving an issue of qualified immunity. See Mitchell v. Forsyth, 472 U.S. 511 (1985); Pueblo Neighborhood Health Centers, Inc. v. Losavio, 847 F. 2d 642, 644-45 (10th Cir. 1988). Britt's interlocutory appeal is properly before this court, because his qualified immunity claim was apparently denied by the district court. On appeal, "[w]e need not confine our review, however, to the viability of the qualified immunity defense." Carlson v. Conklin,

813 F.2d 763, 770-71 (6th Cir. 1987) (42 U.S.C. Section 1983 action could be dismissed for failure to state a claim without reaching the qualified immunity issue); see also Bolden v. Alston, 810 F.2d 353, 356 (2d Cir.), cert. denied, 108 S.Ct. 229 (1987) (court considered qualified immunity issue and exercised pendent jurisdiction to review other issues). Because we find no Bivens remedy under the circumstances of this case, we need not address the qualified immunity issue.

Bivens permits an action for damages against a federal agent who "acting under color of his authority" engages in unconstitutional conduct. 403 U.S. at 389. When there are "special factors counselling hesitation in the absence of affirmative action by Congress," id. at 396, or a congressional statement that money damages could not be recovered due

to the availability of another equally effective remedy, id. at 397, courts should refuse to create damages remedies against federal agents. Accord Bush v. Lucas, 462 U.S. 367 (1983). The Supreme Court has been cautious in extending Bivens into new contexts. Schweiker v. Chilicky, 108 S.Ct. 2460, 2467 (1988).

In Bush v. Lucas, 462 U.S. 367, the Court held that because claims that a superior violated the federal employees' first amendment rights "arise out of an employment relationship that is governed by comprehensive procedural and substantive provisions giving meaningful remedies," it was inappropriate to provide a new judicial remedy beyond the regulatory scheme. Id. at 368. Likewise, in the most recent Supreme Court case on the subject, Schweiker v. Chilicky, 108 S.Ct. 2460, the Court declined to provide a

damages remedy for Social Security disability claimants who alleged federal officials unconstitutionally terminated their benefits. The Court in Chilicky stated that "[w]hen the design of a government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional Bivens remedies." Id. at 2468. "The absence of statutory relief for a constitutional violation... does not by any means necessarily imply that courts should award money damages against the officers responsible for the violation." Id. at 2467. The Court indicated that judicial deference must be given to indications that Congress' inaction was not inadvertent. Id. at 2468. Read together, Chilicky and Bush provide that,

"courts must withhold their power to fashion damages remedies when Congress has put in place a comprehensive system to administer public rights, has 'not inadvertently' omitted damages remedies for certain claimants, and has not plainly expressed an intention that the courts preserve Bivens remedies." Spagnola v. Mathis, 859 F.2d 223, 228 (D.C. Cir. 1988).

Two federal courts of appeals applied the reasoning of Chilicky and Bush to situations similar to the one in the case at bar and concluded there was no Bivens remedy. See McIntosh v. Turner, 861 F.2d 524 (8th Cir. 1988); Spagnola, 859 F.2d 223. In both cases, the plaintiffs filed Bivens actions based on prohibited personnel practices. See 5 U.S.C. Section 2302. The Spagnola court focused on the comprehensiveness of the remedies

provided by the Civil Service Reform Act. 859 F.2d at 229; see also McIntosh, 861 F.2d at 525-27 (relying exclusively on the reasoning in Spagnola; stating Chilicky has unfavorable implications for Bivens actions in any field in which Congress has acted pervasively). Even if the Civil Service Reform Act remedy was incomplete, but had not inadvertently omitted damages remedies, no Bivens remedy would be implied. Spagnola, 859 F.2d at 229.

Hill's allegations that Britt violated his due process rights by interfering with his security clearance and his job possibilities are allegations of prohibited personnel practices. See 5 U.S.C. Section 2302. Accordingly, based on the holdings and reasoning in Bush, Chilicky, Spagnola, and McIntosh, Hill does not have a Bivens action for damages for

these allegations.

Although Hill's allegation of violation of his right to privacy by Britt's eavesdropping on his personal telephone conversations is not an allegation of a violation of a listed prohibited personnel practice, there is no Bivens remedy. The nature of the particular constitutional injury played little role in the Supreme Court's reasoning in Bush. Gleason v. Malcom, 718 F.2d 1044, 1048 (11th Cir. 1983) (allegations that Department of the Army supervisors and other employees violated her first, fourth, and fifth amendment rights by, among other things, listening to her telephone conversations in an open office). Rather, the Court focused on the special factor of federal employment. Id. Chilicky indicates that Bush even extends to plaintiffs who have no remedy under the

Civil Service Reform Act. 108 S.Ct. at 2467. Furthermore, Hill ultimately was fired due to, among other reasons, conversion of telephone services. Hill received full due process, under the comprehensive statutory scheme, after he contested his loss of employment. Cf. Philippus v. Griffin, 759 F.2d 806, 800-09 (10th Cir. 1985) (Bush rationale and holding apply even if no adverse personnel action is taken).

Accordingly, the judgment of the United States District Court for the District of New Mexico in favor of Hill on his Bivens claim is REVERSED, and the cause is REMANDED to the district court with instruction to dismiss count five of the second amended complaint with prejudice. Hill's motion to supplement the record on appeal and for sanctions are DENIED. We have received and considered

Hill's supplemental authority. The mandate shall issue forthwith.

ENTERED FOR THE COURT

PER CURIAM

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

FILED
U.S. Court of Appeals
Tenth Circuit
OCT 06 1989
ROBERT L. HOECKER
Clerk

| | |
|---|---|
| THOMAS W. HILL, Plaintiff-Appellee, | No. 88-2775 |
| v. | |
| DEPT. OF AIR FORCE; PAUL J. VALLERIE, Defendants, and | |
| PAUL. S. BRITT; Defendant-Appellant. | |

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ORDER

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Before HOLLOWAY, Chief Judge, McKAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY and EBEL, Circuit Judges, and BROWN*, District Judge.

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* The Honorable Wesley E. Brown, District Judge, United states District Court for the District of Kansas, sitting by designation.

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This matter is before the court on appellee's petition for rehearing with suggestion for rehearing en banc.

The materials submitted by appellee have been reviewed by the members of the hearing panel, who conclude that the original disposition was correct. Accordingly, the petition is denied on the merits.

The petition having been denied on the merits by the panel to whom the case was submitted, the petition for rehearing with suggestion for rehearing en banc was transmitted to all the judges of the court in regular active service in accordance with Rule 35(b) of the Federal Rules of Appellate Procedure. No member of the hearing panel and no judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules

of Appellate Procedure, the suggestion for rehearing en banc is denied.

Entered for the Court

ROBERT L. HOECKER, Clerk

By [signature]
Patrick Fisher
Chief Deputy Clerk

DECEMBER 8, 1988

Before Honorable Stephen H. Anderson and Honorable James E. Barrett, Circuit Judges, United States Court of Appeals

| | | |
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| THOMAS W. HILL, | ) | |
| | ) | |
| Plaintiff-Appellee, | ) | |
| | ) | No. 88-2775 |
| v. | ) | |
| | ) | |
| DEPT. OF AIR FORCE; PAUL J. VALLERIE, | ) | |
| | ) | |
| Defendants, and | ) | |
| | ) | |
| PAUL. S. BRITT; | ) | |
| | ) | |
| Defendant-Appellant. | ) | |

The court has before it defendant Paul S. Britt's renewed motion for stay pending appeal and emergency stay pending consideration of stay pending appeal and plaintiff Thomas W. Hill's motion to dismiss for lack of jurisdiction.

On December 2, 1988, the district court granted defendant's motion for stay filed in the district court and continued the trial set for December 12, 1988, un-

til further notice. Accordingly, the motion for stay pending before this court is moot.

The motion to dismiss for lack of jurisdiction is without merit. This court has jurisdiction to consider this appeal. See Mitchell v. Forsyth, 472 U.S. 511 (1985).

We note, however, that the record remains unclear regarding the parameters of this appeal. On September 21, 1987, the district court denied in part defendant's motion to dismiss without addressing the issue of defendant's qualified immunity. Defendant moved to supplement the motion to dismiss to further discuss the qualified immunity issue. Without elaboration, the district court denied the motion to supplement on October 14, 1988. On the state of the record, the appeal may not decide the qualified im-

munity issue, see Musso v. Hourigan, 836 F.2d 736 (2d Cir. 1988); Craft v. Wipf, 810 F.2d 170 (8th Cir. 1987); Helton v. Clements, 787 F.2d 1016 (5th Cir. 1986), defendant is directed to seek clarification of the status of the qualified immunity issue in the district court. In the interests of the economy of judicial time, which would result, perhaps the district court will expedite its consideration and disposition of the issue.

The motion to stay is denied as moot. The motion to dismiss is denied.

Robert L. Hoecker, Clerk

By [signature]
Patrick Fisher
Chief Deputy Clerk

Supreme Court, U.S.
FILED
APR 27 1990
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 89-1357

# In the Supreme Court of the United States

OCTOBER TERM, 1989

THOMAS W. HILL, PETITIONER

*v.*

PAUL S. BRITT

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

KENNETH W. STARR
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STUART M. GERSON
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BEST AVAILABLE COPY

## QUESTIONS PRESENTED

1. Whether respondent's notice of appeal was timely filed.

2. Whether the court of appeals correctly concluded that petitioner's *Bivens* claim against his former supervisor was precluded by the Civil Service Reform Act of 1978.

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# In the Supreme Court of the United States

OCTOBER TERM, 1989

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No. 89-1357

THOMAS W. HILL, PETITIONER

*v.*

PAUL S. BRITT

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT*

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## BRIEF FOR THE RESPONDENT IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 34-45) is reported at 884 F.2d 1318. The district court's memorandum opinion and order granting in part and denying in part respondent's motion to dismiss (Pet. App. 15-33) is unreported. The district court's orders denying respondent's motion to supplement the motion to dismiss and setting the case for trial (App., *infra*, 1a-2a) also are unreported.

### JURISDICTION

The judgment of the court of appeals was entered on July 7, 1989. A petition for rehearing was denied on October 6, 1989 (Pet. App. 46-48). The petition

for a writ of certiorari was filed on January 3, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. Petitioner was a civilian employee of the Air Force from January 1966 to July 1985. Immediately prior to the termination of his employment, he was assigned to Kirtland Air Force Base, New Mexico, where he worked in the Directorate of Aerospace Studies. In May 1985, the Air Force served him with a notice of proposed removal from the federal service based on his alleged misuse of government long distance telephone service and his unauthorized removal of records from the desk of a prior supervisor. For the same reasons, the Air Force determined that petitioner was untrustworthy and suspended his top secret security clearance. In July 1985, petitioner's employment was terminated. Pet. App. 2-3, 7; Gov't C.A. Br. 3-4.

2. Petitioner appealed his removal to the Merit Systems Protection Board (MSPB). The MSPB "fully adjudicated" his discharge claim, resulting "in a finding by the MSPB of misconduct" by petitioner and a determination that petitioner's " 'misconduct related to his integrity and trustworthiness.' " *Hill* v. *Department of Air Force*, 844 F.2d 1407, 1413 (10th Cir.) (quoting MSPB Mem. Op. at 24), cert. denied, 488 U.S. 825 (1988). The MSPB decision was affirmed by the Federal Circuit. *Hill* v. *Department of Air Force*, 818 F.2d 874 (1987) (Table).

3. Petitioner also filed suit against the Air Force and against two of his former military supervisors, one of whom was respondent. Petitioner alleged seven different causes of action. In his fourth cause of action, he requested that his security clearance be

restored and that a negative notation—known as a "Z Code" modifier—be removed from his records. The district court granted the motion for a preliminary injunction. Pet. App. 14; Gov't C.A. Br. 5. The court of appeals reversed. *Hill* v. *Department of Air Force*, 844 F.2d 1407 (10th Cir.), cert. denied, 488 U.S. 825 (1988). Noting that petitioner "lost his job because of misconduct," the court held that petitioner "did not have a constitutional property or liberty interest in his security clearance." 844 F.2d at 1410, 1411.

4. In petitioner's fifth cause of action, he raised a *Bivens* claim against respondent.[1] Petitioner alleged that respondent violated petitioner's due process rights by interfering with petitioner's security clearance and future job possibilities and by collecting and disseminating to superiors and other agency officials information concerning petitioner that was false and injurious to his reputation. Pet. App. 20-21, 36. Petitioner also alleged that respondent violated his constitutional rights to due process and to privacy by "taking" petitioner's personal phone conversations—*i.e.*, by eavesdropping on those conversations from adjacent offices or the hallway or by ordering others to do so. *Id.* at 21, 36; Gov't C.A. Br. 13-15.

On September 30, 1986, respondent filed a motion to dismiss arguing, *inter alia*, that he was entitled to qualified immunity and that the Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, 92 Stat. 1111 (codified in scattered sections of 5 U.S.C.), precluded the *Bivens* action. Pet. App. 23, 36. On September 21, 1987, the district court denied the motion to dismiss the *Bivens* action. The court

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[1] See *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971).

held that the CSRA did not preclude the action (*id.* at 23-29), but did not address the issue of qualified immunity.[2]

On June 29, 1988, respondent moved to supplement his motion to dismiss, bringing to the court's attention the fact that it had not ruled on his qualified immunity defense to the constitutional claims. Gov't C.A. Br. 6. On October 14, 1988, the district court denied the motion to supplement. App., *infra*, 2a. On the previous day (October 13, 1988), the district court had set the case for trial. App., *infra*, 1a. On November 9, 1988, respondent filed a notice of appeal from both the October 13 and the October 14, 1988 orders. Gov't C.A. Br. 7.

5. In July 1989, the court of appeals reversed the district court's orders refusing to dismiss the *Bivens* action and setting the case for trial. Pet. App. 34-45. The court initially noted that "[i]t is well settled that a court of appeals has jurisdiction to consider an interlocutory appeal involving an issue of qualified immunity" and that "[respondent's] interlocutory appeal is properly before this court, because his qualified immunity claim was apparently denied by the district court." *Id.* at 37. The court then concluded that, because "no *Bivens* remedy" was available "under the circumstances of this case," it was unnecessary to "address the qualified immunity issue." *Id.* at 38.

The court of appeals determined that the CSRA precludes petitioner's *Bivens* claim. Reviewing this Court's decisions in *Bush* v. *Lucas*, 462 U.S. 367

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[2] In its September 21, 1987 order, the district court also granted the motion by respondent and another defendant to dismiss the first and fifth causes of action to the extent that they alleged common law and Federal Tort Claims Act claims. Pet. App. 33.

(1983), and *Schweiker* v. *Chilicky*, 487 U.S. 412 (1988), the court concluded that those decisions "provide that courts must withhold their power to fashion damages remedies when Congress has put in place a comprehensive system to administer public rights, has not inadvertently omitted damages remedies for certain claimants, and has not plainly expressed an intention that the courts preserve *Bivens* remedies." Pet. App. 40-41 (internal quotation marks omitted). The court observed that two other circuits had "applied the reasoning of *Chilicky* and *Bush* to situations similar to [petitioner's] * * * and concluded [that] there was no *Bivens* remedy." Pet. App. 41 (citing *Spagnola* v. *Mathis*, 859 F.2d 223 (D.C. Cir. 1988) (en banc), and *McIntosh* v. *Turner*, 861 F.2d 524 (8th Cir. 1988)). Agreeing with the holdings and reasoning of those decisions, the court concluded that petitioner could not maintain a *Bivens* action for allegations of prohibited personnel practices under the CSRA, and that interference with security clearances and with job possibilities were prohibited personnel practices. *Id.* at 42-43.

The court also concluded that, even though, in its view, eavesdropping was "not * * * a listed prohibited personnel practice" under the CSRA (Pet. App. 43), the Act precludes petitioner's *Bivens* claim that the alleged eavesdropping constituted a violation of his constitutional right to privacy. The court noted that "[t]he nature of the particular constitutional injury played little role in the Supreme Court's reasoning in *Bush*," and that "the Court focused on the special factor of federal employment." *Ibid.* The court further emphasized that, in light of *Chilicky*, "*Bush* even extends to plaintiffs who have no remedy under the Civil Service Reform Act." *Id.* at 43-44. Finally, the court observed that petitioner "received

full due process, under the comprehensive statutory scheme, after he contested his loss of employment." *Id.* at 44. Accordingly, the court ordered that the fifth cause of action be dismissed with prejudice.[3]

## ARGUMENT

Petitioner raises two issues. First, he asserts that the appeal was not timely filed. Second, he maintains that the court of appeals erred in determining that a *Bivens* cause of action cannot be maintained in the circumstances of this case. Neither contention is well founded, and neither warrants review.

1. Petitioner argues (Pet. 7-12) that respondent's notice of appeal, filed on November 9, 1988, was untimely. Petitioner contends that respondent waived the qualified immunity issue by not raising it in his original motion; alternatively, petitioner suggests that, if it was raised, the notice was due 60 days after September 21, 1987, when the district court issued its order denying respondent's motion to dismiss the fifth cause of action. Petitioner's arguments are meritless.

Rule 4(a)(1) of the Federal Rules of Appellate Procedure provides that, in a civil case in which the United States or an officer of the United States is a party, an appeal must be made within 60 days "after the date of entry of the judgment or order appealed from." In his supplemental motion to dismiss, respondent, an officer of the United States, pointed out to the district court its failure to address his defense of qualified immunity and sought dismissal on the basis of that defense. He then filed a notice of appeal within 60 days after the entry of the district

[3] At the present time, the only claim that has not been dismissed in this action is a claim under the Privacy Act.

court's orders setting the case for trial and denying his supplemental motion. Respondent thus clearly complied with the applicable rule. Petitioner suggests that respondent failed to raise the qualified immunity issue in his initial motion to dismiss, and that respondent should not have been permitted to appeal from the denial of the supplemental motion. Pet. 4-5, 9. But the court of appeals explicitly determined that respondent's "motion to dismiss alleg[ed] absolute and qualified immunity" (Pet. App. 36), and that the district court had simply failed to consider the qualified immunity issue in its September 21, 1987 order addressing that motion. See *id.* at 36-37 ("The district court dismissed part of the fifth cause of action on absolute immunity grounds. It did not discuss qualified immunity."). Contrary to petitioner's contention, respondent's appeal was timely filed.[4]

2. Petitioner also maintains (Pet. 13-17) that the court of appeals erred in concluding that the CSRA precludes his *Bivens* claim. The court of appeals' conclusion, however, is correct, and does not conflict

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[4] In view of the specific procedural background of this appeal, there is no merit to petitioner's contention (Pet. 7-10) that a conflict exists between the instant decision and *Kenyatta* v. *Moore*, 744 F.2d 1179 (5th Cir. 1984), cert. denied, 471 U.S. 1066 (1985). The *Kenyatta* court emphasized that the defendants could not rely on the district court's denial of the defendants' second motion for summary judgment to trigger the 60 days for filing a notice of appeal with respect to the absolute immunity claim because "the issue had been previously decided" by the district court and because the defendants' second summary judgment motion only "nominally reiterated" that claim (744 F.2d at 1187). Here, in contrast, the district court *never* specifically addressed the qualified immunity claim.

with any decision of this Court or any other court of appeals.

The court of appeals determined that, under this Court's decisions in *Bush* v. *Lucas* and *Schweiker* v. *Chilicky*, no *Bivens* remedy should be inferred as a supplement to the CSRA remedies afforded by Congress. Petitioner's allegations that respondent impermissibly interfered with petitioner's security clearances and job possibilities are unquestionably allegations of prohibited personnel practices. Pet. App. 42 (citing 5 U.S.C. 2302). The Tenth Circuit's conclusion that the CSRA precludes a *Bivens* action concerning such practices is consistent with the unanimous view of other courts of appeals.[5] Indeed, the district court's contrary analysis of this question was issued before this Court's decision in *Schweiker* v. *Chilicky*. Two of the court of appeals decisions cited by the district court (Pet. App. 24) to support its analysis were subsequently vacated and decided differently after *Chilicky*;[6] a third was explicitly disavowed in the wake of *Chilicky*.[7] As the Tenth Circuit and other courts of appeals have concluded, Congress explicitly addressed the problem of prohibited

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[5] See, *e.g.*, *Feit* v. *Ward*, 886 F.2d 848 (7th Cir. 1989); *Volk* v. *Hobson*, 866 F.2d 1398 (Fed. Cir.), cert. denied, 109 S. Ct. 2425 (1989); *Kotarski* v. *Cooper*, 866 F.2d 311 (9th Cir. 1989); *McIntosh* v. *Turner*, 861 F.2d 524 (8th Cir. 1988); *Spagnola* v. *Mathis*, 859 F.2d 223 (D.C. Cir. 1988) (en banc).

[6] See *Spagnola*, 859 F.2d at 224; *Kotarski*, 866 F.2d at 311-312.

[7] See *Feit* v. *Ward*, 886 F.2d at 855-856 (disapproving *Egger* v. *Phillips*, 710 F.2d 292 (7th Cir.), cert. denied, 464 U.S. 918 (1983)).

personnel practices, and courts should not supplement that scheme with *Bivens* remedies.[8]

Moreover, the same result is required with respect to petitioner's eavesdropping/privacy claim even though the court of appeals determined that such a claim is not a prohibited personnel practice. As the *Spagnola* court explained (859 F.2d at 228), *Chilicky* makes clear that "*Bush* extends even to those claimants within the system for whom the CSRA provides 'no remedy whatsoever.'" 859 F.2d at 228. In other words, since the CSRA is a comprehensive regime governing the relationship between federal employees and their superiors, Congress's carefully constructed system should not be supplemented by implied judicial causes of action. "When the design of a govern-

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[8] The court of appeals ruled that, because the interlocutory appeal of the order apparently denying qualified immunity was properly before it, the court could address the related, dispositive issue of the availability of a *Bivens* remedy. That ruling is in accord with the decisions of other courts of appeals. See Pet. App. 37-38 (citing *Carlson* v. *Conklin*, 813 F.2d 769, 770-771 (6th Cir. 1987) and *Bolden* v. *Alston*, 810 F.2d 353, 356 (2d Cir.), cert. denied, 484 U.S. 896 (1987)). See also *Drake* v. *Scott*, 812 F.2d 395, 399, modified on other grounds, 823 F.2d 239 (8th Cir.), cert. denied, 484 U.S. 965 (1987). Two courts of appeals, however, have suggested a contrary view. See *Siegert* v. *Gilley*, 895 F.2d 797, 800 (D.C. Cir. 1990); *Todd* v. *United States*, 849 F.2d 365, 368 (9th Cir. 1988). But see *Le Bid* v. *Hanson*, 894 F.2d 1124, 1126 (9th Cir. 1990) (citing lack of *Bivens* remedy as alternative basis for reversal on interlocutory appeal of denial of qualified immunity). But both the *Siegert* and *Todd* decisions held that the defendant was entitled to qualified immunity, and thus the discussion regarding the appealability of closely related, potentially dispositive issues did not affect the outcome on appeal. In any event, petitioner has not raised this question, and it therefore need not be considered by this Court. Sup. Ct. R. 14.1(a).

ment program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, [this Court has] not created additional *Bivens* remedies." *Schweiker* v. *Chilicky*, 108 S. Ct. at 2468. Hence, the court of appeals correctly held that it could not create a *Bivens* damages remedy for such a claim.[9]

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[9] Petitioner's suggestion (Pet. 13) that the court of appeals' decision is in conflict with *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), is incorrect. As an initial matter, petitioner confuses *application* of the qualified immunity standard in a *Bivens* action with the threshold question addressed by the court of appeals (whether a *Bivens* action may be maintained at all). As the court of appeals concluded, in view of Congress's comprehensive treatment of the federal employment relationship, petitioner cannot succeed on the threshold question. Even if the qualified immunity issue itself were considered, however, it is clear that respondent's conduct did not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982). Petitioner "did not have a constitutional property or liberty interest in his security clearance" (*Hill* v. *Department of Air Force*, 844 F.2d at 1411), nor did he have a constitutionally protected interest with respect to future employment. See *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972) (to have a property interest in a job, an individual "must have more than a unilateral expectation of it"). Moreover, respondent's alleged collection of information and dissemination to other agency officials violated no clearly established rights. See *Hill* v. *Department of Air Force*, 844 F.2d at 1412 ("The Air Force could not, and should not, be prohibited from communicating to prospective employers who do work for the government the facts underlying [petitioner's] discharge."). Finally, petitioner's eavesdropping/privacy claim consists of allegations of overhearing of his workplace telephone conversations from adjacent offices and the hallway; no decision clearly establishes that an indi-

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1990

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vidual can have a reasonable expectation of privacy in these circumstances.

**APPENDIX**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

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No. CV 85-1485 JB

THOMAS W. HILL, PLAINTIFF,

*vs.*

DEPARTMENT OF AIR FORCE,
PAUL S. BRITT and PAUL J. VALLERIE, DEFENDANTS.

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[Filed: Oct. 13, 1988]

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MINUTE ORDER

BY DIRECTION OF THE HONORABLE JUAN G. BURCIAGA:

IT IS ORDERED that the captioned case is set for *JURY TRIAL* on the jury issues only on *MONDAY, DECEMBER 12, 1988, AT 9:30 A.M.*, Courtroom 13-West, 13th Floor, U.S. Court House, 500 Gold, SW, Albuquerque, New Mexico.

Requested Jury Instructions are due to the Court on *WEDNESDAY, DECEMBER 7, 1988.*

JESSE CASAUS
Clerk

By /s/ Linda Ward
Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

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Civil No. 85-1485-JB

THOMAS W. HILL, PLAINTIFF,

*v.*

DEPARTMENT OF AIR FORCE,
PAUL S. BRITT and PAUL J. VALLERIE, DEFENDANTS.

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[Filed: Oct. 14, 1988]

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ORDER

THIS MATTER having come on for consideration of Defendants' Supplement To Defendants' Motion To Dismiss Cause of Action V (Docket 333), and the Court having reviewed the memoranda of the parties and being otherwise fully advised in the premises, finds that the motion is not well taken and will be denied.

Wherefore,

IT IS ORDERED, ADJUDGED AND DECREED that Defendants' Supplement To Defendants' Motion To Dismiss Cause of Action V (Docket 333) be and hereby is denied.

DATED this 13th day of October, 1988.

/s/ Juan G. Burciaga
United States District Judge

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